**BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD**

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| **MICHAEL D. BEDNAR** | ) | |
| Claimant | ) | |
| V. | ) | |
| | ) | |
| **JACKSON COUNTY** | ) | |
| Respondent | ) | Docket No. 1,076,327 |
| AND | ) | |
| | ) | |
| **KANSAS WORKERS RISK COOPERATIVE FOR COUNTIES** | ) | |
| Insurance Carrier | ) | |

# ORDER

## STATEMENT OF THE CASE

Claimant appealed the March 16, 2016, Preliminary Hearing Order entered by Administrative Law Judge (ALJ) Rebecca Sanders. John J. Bryan and Jan L. Fisher of Topeka, Kansas, appeared for claimant. Ronald J. Laskowski of Topeka, Kansas, appeared for respondent and its insurance carrier (respondent).

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the March 15, 2016, preliminary hearing and exhibits thereto; and all pleadings contained in the administrative file.

## ISSUES

Claimant asserts he sustained personal injuries by accident arising out of and in the course of his employment on January 15, 2016, when he fell from a road grader during a work break. Claimant cannot remember how he fell or what caused him to fall. Respondent contends claimant's injuries are not compensable because they resulted from an idiopathic cause. In the alternative, respondent contends claimant's accident was the result of a personal risk.

The ALJ found:

> The Court notes that none of the cases cited by Claimant are unexplained falls. In all the cases cited by Claimant, the falls were explained and the evidence

showed an inherent risk in the employment Claimants were performing. These cases are distinguishable from the present case.

The two Board cases cited by Respondent were injuries that were caused by unexplained falls. That is the case herein. Claimant was sitting in the cab of a road grader drinking coffee and eating cookies. At the hearing, Claimant testified he doesn't remember opening the cab door or exiting the road grader. Prior to the hearing, Claimant speculated that he might have choked on coffee or the cookies and might have opened the cab door to spit it out. Nevertheless if that is the case, it was a personal condition that caused Claimant to open the cab door.

One can speculate that a road grader is risky or inherently dangerous. There was some evidence the floor of the cab was five foot off the ground. However, such a fact in and of itself does not make a road grader risky or dangerous. There was no evidence of tracing any risk inherent in Claimant's job to his fall. No explanation has been presented for Claimant falling out of the cab.

This is a very unfortunate accident. However in 2011 the Kansas Legislature clearly stated a clear intent to exclude such unexplained injuries from being covered by Worker's Compensation benefits.

Claimant's preliminary hearing requests are denied.[1]

The issues are:

1. Did claimant's accident or injuries arise either directly or indirectly from an idiopathic cause?

2. If not, did claimant's accident or injuries arise from a personal risk?

## FINDINGS OF FACT

The facts of this claim are largely uncontroverted. Claimant operated a road grader for respondent. Claimant would take his breaks by pulling over on the side of the road. He typically got out of the road grader and took his break. The floor of the road grader cab is approximately five feet above the ground.

Claimant recalled stopping at an intersection on January 15, 2016, and seeing a sign identifying the roads. The next thing claimant remembered was lying on the ground in a puddle of blood. He did not remember how he got out of the road grader. Claimant was able to get to his cell phone, which had fallen out of his pocket, and call his boss. Claimant was treated at the scene by Jackson County EMS and transported to

[1] ALJ Order at 10-11.

Stormont-Vail Hospital. Claimant's next memory was a woman in the hospital pulling a stitch too hard on his forehead.

Claimant indicated he had no history of epileptic spells and did not feel faint the day of the accident. He acknowledged that at an earlier deposition, he testified the last thing he remembered was drinking coffee and eating some cookies. He did not know if he choked on the cookies and coffee. Nor did he know if he fainted prior to falling. Claimant had a cold and a cough on the day of the accident. He did not remember telling doctors at the hospital that he was drinking coffee, coughed and choked, causing him to open the road grader door.

Matt Fritz, claimant's co-worker, received a call from his boss that a worker was down in the middle of the road. Mr. Fritz was the first person who arrived at the accident scene. Mr. Fritz testified claimant did not explain what happened. Greg Elder, another co-worker, arrived next. Mr. Elder testified claimant did not recollect how he got to the ground. Mr. Fritz and Mr. Elder testified claimant did not recognize them.

Jackson County EMS records of January 15 indicated claimant was grading the gravel road and had a loss of consciousness and woke up on the road. EMS records also indicated claimant denied remembering the events leading up to his injury.

Claimant was seen by Brandon K. Pruitt, M.D., at Stormont-Vail Emergency Department at 11:15 a.m. on January 15. The doctor's notes indicated claimant recalled coughing and the next thing he remembered was waking up on the ground.

William E. Sachs, M.D., treated claimant at noon on January 15 at Stormont-Vail Trauma Care. Dr. Sachs diagnosed claimant with a left forehead laceration and cervical spine fractures. The doctor indicated claimant initially had amnesia regarding the accident, but began remembering events later. Claimant believed he was choking on some coffee and coughing a lot and then opened the door of his grading truck to spit it out. Claimant did not remember falling. Amanda M. Seetin, PA-C, saw claimant the same time as Dr. Sachs and repaired claimant's laceration using 11 sutures. Ms. Seetin's notes were identical to Dr. Sachs with regard to what claimant reported about his accident.

Stephen J. Eichert, D.O., examined claimant on January 15. Dr. Eichert indicated claimant was getting out of his truck, coughed and fell, then had a loss of consciousness and neck pain. On the same day, Dr. Eichert performed neck surgery, including a fusion.

On January 18, claimant was interviewed by Tina Cox, an insurance adjustor for respondent's workers compensation insurance carrier. Claimant told Ms. Cox that at approximately 9 or 9:30 a.m. on the day of the accident, he was eating a cookie, took a drink of coffee and choked on the cookie. He opened the door of the cab to spit out the cookie to avoid getting it inside the cab and for some reason fell, landing on the road grader blade.

## PRINCIPLES OF LAW AND ANALYSIS

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.[2] "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act."[3]

K.S.A. 2014 Supp. 44-508(f), in part, states:

> (2)(B) An injury by accident shall be deemed to arise out of employment only if:
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> (i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and
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> (ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.
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> (3)(A) The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include:
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> (i) Injury which occurred as a result of the natural aging process or by the normal activities of day-to-day living;
>
> (ii) accident or injury which arose out of a neutral risk with no particular employment or personal character;
>
> (iii) accident or injury which arose out of a risk personal to the worker; or
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> (iv) accident or injury which arose either directly or indirectly from idiopathic causes.

Board review of a judge's order is de novo on the record.[4] The definition of a de novo hearing is a decision of the matter anew, giving no deference to findings and

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[2] K.S.A. 2014 Supp. 44-501b(c).

[3] K.S.A. 2014 Supp. 44-508(h).

[4] See *Helms v. Pendergast*, 21 Kan. App. 2d 303, 899 P.2d 501 (1995).

conclusions previously made by the judge.[5] The Board, on de novo review, makes its own factual findings.[6]

The first issue is whether the cause of claimant's fall is unknown. There is evidence to support a finding that claimant's fall is unexplained. Claimant testified he remembered stopping at an intersection in his road grader and his next memory was lying on the ground in a pool of blood. Given the fact claimant suffered a blow and a severe laceration to his head, his lack of recollection is understandable. There is also evidence to support a finding that claimant's fall was caused by choking or a coughing spell. Claimant told Dr. Sachs, Ms. Seetin and the insurance adjustor about drinking coffee and/or eating a cookie, choking and opening the road grader door to spit.

Respondent cites *Portillo*[7] and *Graber*[8] in support of its contention that claimant's fall is unexplained. In both cases, the Board or deciding Board Member determined injuries sustained by Ms. Portillo and Mr. Graber arose from idiopathic causes. Ms. Portillo fell while cleaning a bathtub and testified she did not recall why she fell. In *Graber*, which is on appeal to the Kansas Court of Appeals, Mr. Graber stopped in a restroom after a work meeting. He next remembered being loaded onto a Lifewatch helicopter. He later learned he fell down some stairs. Unlike the present case, no medical records were introduced in *Portillo* or *Graber* wherein Ms. Portillo or Mr. Graber told medical providers what occurred shortly before they fell.

*Wilson*[9] is another case wherein it was alleged the worker's accidental injury arose from an idiopathic cause. Mr. Wilson was found near the back of a semi trailer and the passenger side door was open. He was unable to completely recall the details of the accident, and did not remember what he was doing on the day he was injured. There were no actual witnesses, but it was speculated that a gust of wind blew the doors on the trailer out while he was trying to latch them and one of the doors hit him on the head, knocking him down. A Board Member found the cause of Mr. Wilson's accident was known, stating:

> This Board Member finds the explanation provided by Dr. Murati to be persuasive in this matter. Claimant was more probably than not, struck by the door, swinging in the wind. He then fell forcibly to the ground where he was discovered by his co-

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[5] See *In re Tax Appeal of Colorado Interstate Gas Co.*, 270 Kan. 303, 14 P.3d 1099 (2000).

[6] See *Berberich v. U.S.D. 609 S.E. Ks. Reg'l Educ. Ctr.*, No. 97,463, 2007 WL 3341766 (Kansas Court of Appeals unpublished opinion filed Nov. 9, 2007).

[7] *Portillo v. Motel 6*, No. 1,066,522, 2015 WL 2169364 (Kan. WCAB Apr. 13, 2015).

[8] *Graber v. Dillon Companies*, No. 1,057,449, 2015 WL 996892 (Kan. WCAB Feb. 27, 2015), appealed to the Kansas Court of Appeals, Mar. 19, 2015.

[9] *Wilson v. Price Truck Line, Inc.*, No. 1,063,947, 2015 WL 1524523 (Kan. WCAB Mar. 30, 2015).

> workers. Claimant has satisfied his burden of proving he suffered personal injury by accident which arose out of and in the course of his employment with respondent. The award of benefits by the ALJ is affirmed.

Here, the ALJ relied on claimant's testimony that he did not know why he fell from the road grader. This Board Member views the facts in a different light and places greater emphasis on what claimant told medical providers and the insurance adjustor. This Board Member concludes claimant's injuries did not arise from an idiopathic cause. Although claimant did not specifically state his fall was caused by a coughing fit, more probably than not, his fall resulted from choking and losing consciousness or losing his balance while choking, coughing or spitting.

In situations such as those presented in *Wilson* and the present case, pertinent facts, logic and common sense can be used to determine the cause of an accident. Otherwise, all work accidents where there are no witnesses and the worker cannot remember what occurred would arise from an idiopathic cause.

Respondent argues that if claimant's injuries did not arise from an idiopathic cause, they resulted from a personal risk. At the time he choked and/or was coughing, claimant was on a work break authorized by respondent. Generally, injuries that occur during short breaks on the premises of the employer are considered compensable.[10] Work breaks benefit both the employer and employee.[11]

In *Fratzel*,[12] a Board Member found Ms. Fratzel's accidental injuries compensable. Ms. Fratzel had an urgent need to use the restroom while she was checking out a customer at respondent's store. After finishing her task, she began walking briskly to the restroom when she fell. Ms. Fratzel thought her shoe got caught on a tile or she stubbed her toe, while another witness indicated Ms. Fratzel tripped over her frayed pants. The Board Member deciding *Fratzel* reasoned:

> While claimant's injury was associated with her urgent need to use the restroom, it did not arise out of a personal risk. A personal risk is quite different from every persons' universal need. Claimant's accident occurred while she was rushing to the restroom. The risk in this case was claimant needing to hurry to the restroom because she had been attending to her work. This scenario presents an employment risk, not a neutral risk. Claimant's fall was also not unexplained. While

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[10] *See* 1 Larson's Workers' Compensation Law § 13.05(4) (2013); *Wallace v. Sitel of North America*, No. 242,034, 1999 WL 1008023 (Kan. WCAB Oct. 28, 1999).

[11] *Id.*; *Jay v. Cessna Aircraft Co.*, No. 1,016,400, 2005 WL 3665488 (Kan. WCAB Dec. 14, 2005); *Vaughn v. City of Wichita*, No. 184,562, 1998 WL 100158 (Kan. WCAB Feb. 17, 1998) and *Longoria v. Wesley Rehabilitation Hospital*, No. 220,244, 1997 WL 377961 (Kan. WCAB June 9, 1997).

[12] *Fratzel v. Price Chopper*, No. 1,066,540, 2014 WL 517247 (Kan. WCAB Jan. 27, 2014).

> she was not certain, she testified her foot caught on tile and the evidence establishes her accident was due to her being in a hurry to get to the toilet in an attempt to make up for time lost while waiting on a customer.

In *Roath*,[13] Ms. Roath's accidental injury occurred when, while on a work break, she went to retrieve her purse from her car in a parking lot not owned by or under the control of ASR.[14] Ms. Roath fell in the parking lot, injuring herself. She testified it was customary for employees to go to their cars during breaks. The Board found Ms. Roath's injury arose out of and in the course of her employment.

This Board Member concludes claimant's accident resulted from a work risk, not a personal risk. He choked while consuming coffee and cookies during an authorized work break, causing him to fall from his road grader.

By statute the above preliminary hearing findings are neither final nor binding as they may be modified upon a full hearing of the claim.[15] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2014 Supp. 44-551(l)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.[16]

**WHEREFORE**, the undersigned Board Member reverses the March 16, 2016, Preliminary Hearing Order and remands claimant's preliminary hearing requests for the ALJ's consideration.

**IT IS SO ORDERED.**

Dated this ____ day of May, 2016.

HONORABLE THOMAS D. ARNHOLD
BOARD MEMBER

[13] *Roath v. ASR International Corporation*, No. 1,032,944, 2008 WL 651675 (Kan. WCAB Feb. 18, 2008).

[14] Ms. Roath was employed by ASR, a company providing support services, and at the time of her accident was working at a facility owned by Pitney Bowes.

[15] K.S.A. 2014 Supp. 44-534a.

[16] K.S.A. 2014 Supp. 44-555c(j).

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Honorable Rebecca Sanders, Administrative Law Judge